

APR 22 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS A. DARBY,

Petitioner - Appellant,

v.

ANA RAMIREZ-PALMER,

Respondent - Appellee.

No. 07-15959

D.C. No. CV-02-01119-CW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted April 13, 2009^{**}

Before: GRABER, GOULD, and BEA, Circuit Judges.

California state prisoner Thomas A. Darby appeals pro se from the district court's order denying his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Darby contends that the admission of the child victim's out-of-court audiotaped and videotaped statements at trial without the opportunity for cross-examination deprived him of his right to confrontation under the Sixth and Fourteenth Amendments. Because the Supreme Court has held that *Crawford v. Washington*, 541 U.S. 36 (2004), has no retroactive application to cases on collateral review, we apply the law as it stood prior to *Crawford*. See *Wharton v. Bockting*, 549 U.S. 406, 421 (2007); *Bockting v. Bayer*, 505 F.3d 973, 978 (9th Cir. 2007). We conclude that the state court's decision rejecting Darby's Confrontation Clause claim was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and that it was not based upon an unreasonable determination of the facts. See 28 U.S.C. § 2254(d); see also *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Idaho v. Wright*, 497 U.S. 805, 815, 821-22 (1990).

To the extent that Darby alleges a Confrontation Clause violation arising from the admission of the victim's out-of-court statements through the in-court testimony of her grandmother, this contention lacks merit. See 28 U.S.C. § 2254(b)(2); see also *Cassett v. Stewart*, 406 F.3d 614, 623 (9th Cir. 2005); *Wright*, 497 U.S. at 816-17.

We construe the uncertified issues briefed by Darby as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) (per curiam).

The Clerk is directed to provide Darby with a copy of the Ninth Circuit docket report from this case.

AFFIRMED.